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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

WHITAKER WRIGHT, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL for the southern district of New York, et al. } No. 661.

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This is an appeal from the decision of the United States circuit court for the southern district of New York dismissing writs of habeas corpus and certiorari sued out by the petitioner herein and remanding the said Whitaker Wright to the custody of the United States marshal for said district under a warrant issued by United States Commissioner Thomas Alexander pending proceedings for his extradition to Great Britain.

This case was instituted on the complaint of Sir Percy Sanderson, the consul-general of Great Britain

at New York, and in a sense the United States is not concerned. The United States, however, asks to be heard because certain questions presented are public and international, involving ultimately its obligation under this particular treaty with Great Britain, and requiring consideration of the principles affecting treaties and extradition generally.

But the United States does not appear to be called upon in the present proceeding and does not volunteer to present any argument on the special facts of this case relative to the exact nature of the offense charged. Such argument will properly be left to counsel for the British Government.

While the complaint in this case, issued by the commissioner on the 16th day of March, 1903, asks for a provisional warrant for the arrest of said Wright it is to be observed that the treaty between the United States and Great Britain of August 9, 1842, and the extradition convention between the United States and Great Britain of July 12, 1889, contain no clause for provisional arrest and detention, such as is found in several other treaties for the extradition of criminals.

> Convention between the United States and the Kingdom of the Netherlands, June 2, 1887, Art. XII. (26 Stat. at L., 1487.)
>
> Convention between the United States and the Republic of Colombia, May 7, 1888, Art. VII. (26 Stat. at L., 1537.)
>
> Convention between the United States and the Empire of Russia, March 28, 1887, Art. VII. (28 Stat. at L., 875.)

Neither do the statutes of the United States relative to extradition contain any general provisions imposing upon this Government the duty of apprehending and detaining fugitive criminals to await the arrival of extradition papers from the foreign government.

We feel, however, that there are at least two questions of law presented by the record in this case which are of general importance, the decision of which may be controlling in all future extradition cases.

I.

THE APPEAL HEREIN SHOULD BE DISMISSED FOR THE REASON THAT ALL PROCEEDINGS UNDER THE COMPLAINT OF MARCH 16, 1903, AND THE WARRANT OF ARREST ISSUED THEREON HAVE BEEN ABANDONED BY THE BRITISH GOVERNMENT.

The affidavit of Mr. Charles Fox, counsel for the British Government in this case, shows that there is in realty no case before the court, or at least nothing but a moot inquiry. The British Government has abandoned absolutely the complaint of March 16, which is the foundation of this appeal. It has moved that this complaint and suit be dismissed, and has consented that, so far as said complaint is concerned, the appellant may be released forthwith. The commissioner before whom such motion was made held that he was without power to dismiss because the case had gone from him to the circuit court on habeas corpus and certiorari, and now it has proceeded beyond that court. But surely in the forum which has jurisdiction, a suitor may dismiss his proceeding, especially a suitor who is the representative of a friendly

foreign government seeking to exercise under a treaty an international right which expresses a comity of the highest consequence and necessity. We understand that the British authorities say again, and now to this court, that they seek to dismiss their complaint of March 16. They have filed before the commissioner, and are proceeding under, a new complaint setting forth with greater detail and formality the charge against Wright. The motion was renewed more than once to dismiss the complaint of March 16. The new complaint of March 31, and the proceedings under the latter complaint, are now before this court in the form of an affidavit. We understand it to be a general principle that a complainant may thus dismiss and begin *de novo*. The suggestion, therefore, is pertinent that this court may properly dismiss the pending appeal on the ground that there is nothing before it herein, without prejudice, however, to any contention which the appellant may present here or elsewhere on the merits, when an actual and proper case is presented, and such actually existing case is already presented before the commissioner.

But assuming that this court may now desire to hear argument with reference to the questions of law which the Government conceives to be of such importance as to require it to ask leave of the court to be heard, we will proceed at once to their discussion.

II.

IF THE LAWS OF THE STATE OF NEW YORK, WHEREIN THE PETITIONER WAS ARRESTED, MAKE THE ACT CHARGED IN THE COMPLAINT CRIMINAL, WHICH ACT IS MADE CRIMINAL BY THE LAWS OF GREAT BRITAIN, THE PETITIONER COULD BE PROPERLY HELD FOR EXTRADITION UNDER THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN, NOTWITHSTANDING THE FACT THAT SUCH ACTS AS CHARGED IN THE COMPLAINT ARE NOT MADE CRIMINAL BY THE STATUTES OF THE UNITED STATES.

> It has been held that the rule that the evidence must be such as to justify commitment for trial at the place where the fugitive is found, if the offense had there been committed, applies not only to the admissibility and the amount of evidence required for that purpose in the particular place, *but also to the definition of the offense.* (Moore on Extradition, sec. 344.)

In the case of Christiana Cochrane (4 Opins., 330), Attorney-General Nelson, said:

> No rule more explicit or certain than that contained in the treaty itself can, indeed, be prescribed. Cases as they occur *necessarily depend upon the laws of the several States* in which the fugitive may be arrested or found.

And Mr. Calhoun, while Secretary of State, on December 4, 1844, in a note to the French minister, said:

> What evidence is necessary to authorize an arrest and commitment *depends upon the laws of the State* or place where the criminal may be found. (Moore on Extradition, sec. 344.) See also note containing correspondence between

> the Dutch minister and Mr. Fish, then Secretary of State, relative to this same question, in 1873. (Moore on Extradition, sec. 337.)

And this construction of extradition treaties by the State Department seems to find ample support in the decisions of the Federal courts. An early case in which we find this question considered is *In re Muller* (17 Fed. Cases, 975), which arose in the district court for the eastern district of Pennsylvania in 1863. The court in that case said:

> The remaining question was whether these depositions would, within the meaning of the treaty, have sufficed to justify his apprehension and commitment for trial under a charge of forgery if the offense had been committed here. They fully sufficed to prove the act which was charged. Such an act, wherever punishable as a crime, is properly classed as a specific offense under the general head of "forgery." In the jurisprudence of Pennsylvania, at the date of the treaty with Saxony, this act would not have been punishable as a crime. But before its commission in Saxony, the Pennsylvania statute of March 31, 1860, sec. 169 (Laws, 1860, p. 423), had made such an act indictable and punishable as a misdemeanor. In the series of treaties which have been mentioned, certain offenses, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and leg-

islation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place but not in another. I thought that the question *depended upon the law of Pennsylvania under the statute of 1860*, and that the case on the part of the Saxon Government had, therefore, been made.

There is no jurisprudence or common law of the Government of the United States. See [*U. S.* v. *Hudson*] 7 Cranch [11 U. S.], 32; [*U. S.* v. *Coolidge*] 1 Wheat. [14 U. S.], 415; [*Wheaton* v. *Peters*] 8 Pet. [33 U. S.], 658; [*Kendall* v. *Stoker*] 3 How. [44 U. S.], 104. No legislation of their Government, independently of the jurisprudence and legislation of the *several States*, can have been expected by those who made the treaties ever to give specific definition of certain crimes mentioned in them. No such legislation as to forgery or private writings, which is the offense here charged, can have been expected. As to crime, and others, *local definitions and rules might be not less different in Ohio and Pennsylvania and in Scotland and in England, or might be more different.* In framing the treaty of 1842 with Great Britain, *these local differences must have been mutually considered* by the governments of the two contracting nations. (17 Fed. Cases No. 9913, p. 975.)

And in the case of *In re Farez* (7 Blatch., 345; 8 Fed. Cas., 1007), which arose in the circuit court for

the southern district of New York in 1870, the court said:

> The warrant of arrest issued against the prisoner in Switzerland, and translations of the foreign documents and the statutes of the State of New York, were then put in evidence without objection. It was then admitted by the counsel for the prisoner that the prisoner was Francois Farez, and that he was a farrier and hotel keeper, of Les Bois, Switzerland. The prosecution then rested, and the counsel for the prisoner moved to discharge the prisoner on several grounds. The first was that it ought to be shown that the punishment for the offense charged was infamous, and that that had not been shown. I think that the proper construction of the fourteenth article of the convention with the Swiss Confederation is that there can be no extradition of a person charged with any one of the crimes enumerated in that article unless such crime is subject to infamous punishment in the country where the crime is committed. It was therefore necessary to show in this case that the crime with which Farez was charged was subject to infamous punishment in Switzerland. That was, in my judgment, sufficiently shown. The offense charged was clearly, according to the papers, *an offense against the laws of the Canton of Berne, just as here it would have been an offense against the laws of the State of New York.*

And in the case of *Grin* v. *Shine*, 187 U. S., 181, a similar question was referred to. And while the court did not deem it necessary to inquire whether the words

"evidence of criminality" included a definition of the crime charged, or to determine by what law the elements of the crime of embezzlement are fixed, the court nevertheless applied the definition of embezzlement given in the laws of California, for the reason that the petitioner himself sought to apply such definition as being most favorable to himself.

Such a construction of an extradition treaty for obvious reasons must be adopted, for every extradition treaty which the United States has entered into with a foreign government contains an enumeration of some crimes that are not made offenses under the laws of the United States as distinguished from the laws of the several States, and in some instances an enumeration of crimes which were not offenses at common law.

The language of the treaty between the United States and Great Britain, which it is claimed by counsel for the appellant to be against this construction, is contained in paragraph 4 of Article I of the Extradition Convention of July 12, 1889 (26 Stats., 1508), and is as follows:

> Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

Judge Lacombe, in his opinion found on page 11 of the record in this case, in construing this provision of the treaty, says:

> When, by the law of England and by the law of the State in which the fugitive is found,

> the fraudulent acts which it is charged he has committed are made criminal, he is fairly within the treaty; a statute of the State is, broadly speaking, a "law of this country" as contradistinguished from a "law of Great Britain."

The language of the treaty is as broad and comprehensive as it is possible to make it—"being made criminal by the laws of both countries." It does not say "made criminal by the acts of the British Parliament and the *Federal laws* of the United States," for such a provision would manifestly be inadequate for the purposes of the treaty. For on the side of Great Britain is contemplated the criminal laws of England, Scotland, Ireland, Canada, Australia, and all other British colonies or dependencies, while on the part of the United States the treaty must necessarily contemplate the Federal criminal laws, as well as the criminal laws of the several States. At the time of the making of this treaty this Government recognized to the fullest extent that the laws made by the legislatures of the several States were the laws of this country. Furthermore, as to this point it seems to preclude further discussion if we ask the simple question: Suppose the case were reversed and the United States were seeking to extradite under this treaty from Great Britain a person indicted for this same offense or for murder under the laws of the State of New York, would the tribunals of Great Britain be justified in declining to find the offense charged to be within the treaty because the law violated here was a law

of one of the several States and not a law of the United States?

Section 611, paragraph 3, of the penal code of the State of New York, provides as follows:

> A director, officer, agent, or employee of any corporation or joint-stock association who: * * *
>
> Knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, * * * is guilty of a misdemeanor. (Identical with § 603 N. Y. Penal Code, 1882.)

While section 84, chapter 96, of 24 and 25 Victoria, provides:

> Whosoever, being a Director, Manager, or Public Officer of any Body Corporate or Public Company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written Statement or Account which he shall know to be false in any material Particular, with Intent to deceive or defraud any Member, Shareholder, or Creditor of such Body Corporate or Public Company, or with intent to induce any Person to become a Shareholder or Partner therein, or to intrust or advance any Property to such Body Corporate or Public Company, or to enter into any Security for the Benefit thereof, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to any of the Punishments which the Court may award as hereinbefore last mentioned.

It will thus be seen that the laws cited exactly apply to the facts set out in the new complaint of March 31, 1903, and thus clearly present a case which is "made criminal by the laws of both countries," in accordance with the phrase of the treaty under consideration.

In re Frank (107 Fed. Rep., 272) is a case in which the United States court for the district of Oregon considered the treaty between the United States and Great Britain and held that, for the purpose of determining whether the offense was an extraditable one under that treaty, the laws of the State of Oregon, where the petitioner was arrested, and the laws of the province of British Columbia, where the offense was alleged to have been committed, should be resorted to for the purpose of determining such question.

The decision there was that, since upon particular inquiry the British law made that a crime which was not a crime in Oregon, the accused must be discharged; but that result does not affect the point which we are making.

In *Cohn* v. *Jones, warden* (100 Fed. Rep., 639), the United States district court for the southern district of Iowa clearly recognized that in construing the extradition treaty between the United States and Great Britain the laws of Iowa should be resorted to. It may be observed that the court there also held that the question whether a given offense comes within a treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for; but as we have pointed out, the New York law of 1882

covered the offense in this case, and the English law is of the year 1862. We therefore rely on the finding of the circuit court that the offense here comes within the laws of both countries.

III.

THE PETITIONER WAS NOT ENTITLED TO BE ENLARGED ON BAIL UNDER ANY LAW OF THE UNITED STATES, FOR THE REASON THAT NO PROVISION IS MADE IN THE LAW RELATING TO EXTRADITION OF CRIMINALS FOR ADMISSION TO BAIL.

The statutes of the United States, relating to procedure in extradition cases, contain a significant indication of the way in which the law views this matter. Section 5270 of the Revised Statutes provides for complaint, arrest, hearing, etc., and directs the commissioner or judge "to issue his warrant for the commitment of the person so charged to the proper jail, *there to remain* until such surrender shall be made."

We are informed that counsel for appellant, in the court below, urged as an authority for the commissioner to enlarge the petitioner on bail the case of *Queen* v. *Spilsbury* (1898, 2 Q. B. D., 615). But an examination of this case shows that it was not an international extradition matter, but came within what is called the "fugitive offenders act;" which law is limited in its application to the apprehension of offenders who had committed crimes and been found within the dominions of Great Britain, and is very similar in its provisions to our interstate rendition laws. The court there held that it had the common-law right to admit

to bail; but, exercising that right, it being discretionary under the common law whether to admit to bail or not, it denied the application to enlarge the accused upon bail.

And while the court in that case came to the conclusion, after considerable hesitation, that it had the power to admit to bail under the fugitive offenders act, Justice Wright, in a concurring opinion, clearly recognized that the case should not be considered a precedent under extradition treaties. His language is as follows:

> I am of the same opinion, and for the same reasons, but I wish to add this observation, that cases arising under the fugitive offenders act will not in all instances apply as precedents in cases under the extradition acts. Under the fugitive offenders act it is generally a question between different parts of Her Majesty's dominions, but under the extradition acts the jurisdiction depends in all cases on treaties with foreign countries. (2 Q. B. D., 1898, pp. 615–625.)

The treaty provides that any person found within the jurisdiction of either of the high contracting parties, charged with a crime mentioned in the treaty and committed within the jurisdiction of the one making the demand, shall be apprehended in the territory of the other upon a complaint under oath stating the jurisdictional facts, and that thereupon a hearing shall be had; and if the evidence is deemed sufficient it is to be certified, as required by law, to the Secretary of State, in order that a warrant may be issued for

the surrender of the accused. Each Government contracts in such case to surrender any person for whom a warrant for surrender is issued. But if the accused were permitted to be released on bail, and the proceedings should result in a warrant of surrender, and it should then appear that the accused had fled from the jurisdiction of the government, it would be impossible for such government to fulfill its obligation under the treaty by surrendering the accused. If the bail should be forfeited, who would enforce it, and whose duty would it be to attempt to regain the custody of the accused? When the demanding government has done all the treaty and the law requires it to do, it is entitled under the stipulations contained in the treaty to the delivery of the accused upon the issuance of a warrant for his surrender.

A fortiori we claim that the accused should not be released from custody pending an examination and the proceedings leading up to such commitment for final surrender.

There appears to be but one case reported wherein this matter was squarely considered, viz: *In re Carrier* (57 Fed. Rep., 578), in the district court for the district of Colorado, in which Judge Hallett said:

> Petitioner is charged with larceny in the Dominion of Canada before a commissioner of the circuit court, under the treaty of 1842 with Great Britain, and title 66 of the Revised Statutes, relating to extradition. The commissioner has continued the hearing for some days with a view to obtain further testimony, and he has

refused to admit the petitioner to bail during the time of such continuance. The matter for consideration upon the petition is whether the accused is entitled to be enlarged on bail under the circumstances. Obviously a proceeding in extradition under the treaty and the act of Congress of 1848 (9 Stat., 302), with a view to determine the probable guilt of the accused before executing the terms of the treaty, is quite aside from the general course of criminal procedure. It is not a question whether larceny is a crime bailable at common law, or by our law, or by the law of Canada. The proceeding stands upon the statute only, and it is believed that no departure can be made from the statute in any substantial matter. It is said that in matters not mentioned in the statute the practice should be according to the course of our law. The matter of admitting to bail is not a question of practice. Since the time of Edward I it has been regulated by statute; and in our day bail is not allowed in any case except in pursuance of some statute.

It was said by counsel for petitioner that there is nothing in the act of 1848 to forbid the allowance of bail pending a hearing. But this is not enough; the authority should be expressed in the act itself. It provides that, if the charge be sustained, at the hearing, "It shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made;" so that, in so far as there is in the act any expression on

the subject, bail is denied. It is significant that in the earlier act of 1789 (1 Stat., 91), relating to the arrest of persons in one Federal district who may be charged with crime in another district, there is ample provision for taking bail, and therefore it can not be said the subject was overlooked in the act of 1848. In 1882 the act of 1848 was considerably amended in respect to the manner of getting testimony and some other matters, but the subject of bail was not touched upon (22 Stat., 215). This last act further shows the intention of Congress to regulate all proceedings in extradition by special act, leaving nothing of substance to be borrowed from the general course of criminal procedure. Inasmuch as there is not in the act of 1848 or in any of the amendatory acts any provision for bail pending a hearing, under those acts the decision of the commissioner seems to have been correct, and the writ will be refused.

And Judge Lacombe, in the case at bar, said:

Applications to admit to bail in such cases have on several occasions (although not recently) been made to the circuit court in this district, and have been uniformly denied, although no opinions appear to have been written.

It is not difficult to conceive of some sufficient reason why the United States, having assumed certain treaty obligations, should provide a scheme for carrying them out which should not provide for enlargement on bail; and we find that, whereas the statutes regulating the arrest of persons in one Federal district who may be

charged with crime in another district provide for taking bail, the statute regulating international extradition makes no such provision.

The opinion of Lord Russell in *Queen* v. *Spilsbury*, 2 Q. B. D. (1898), 615, upon which petitioner principally relies, and which holds that "the Court of Queen's Bench has, independently of statute, by the common law, jurisdiction to admit to bail," is not persuasive. The opinion concludes with the statement: "This inherent power to admit to bail is historical, and has long been exercised by this court, and if the legislature had meant to curtail or circumscribe this well-known power their intention would have been carried out by express enactment." The circuit courts of the United States, however, have no such historical heritage. "These courts are creatures of statute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them." (*Bath County* v. *Amy*, 13 Wall., 244.)

While the authorities are singularly few in which this question of the right of the accused to give bail has been presented to the courts, the practice of refusing bail has been universally recognized both in this country and in England, and we do not remember a single case in which the courts of either country have released the accused on bail during the pendency of such proceedings.

The Constitution of the United States contains the provision that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

punishments inflicted." (United States Constitution, Art. 8.) And similar provisions are contained in the constitutions of the several States. Section 5 of Article I of the constitution of the State of New York is as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

But these provisions of the State and Federal constitutions have evidently never been construed as conferring upon the accused a constitutional right to enlargement on bail in all cases.

Sections 1014 and 1015 of the Revised Statutes of the United States are as follows:

> SECTION 1014. For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses

> for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had. (See sec. 879.)
>
> SECTION 1015. Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death, and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders.

These two sections must be read together, and it is apparent that the law relative to bail contemplates "crimes and offenses against the United States."

It is evident, therefore, that the legislative branch of our Government had a purpose in omitting, from all extradition treaties and from the laws governing the course of procedure in such cases, any provision which would allow the accused to be released on bail. And we can not express that purpose of the law-making power more forcibly than to conclude this discussion with a quotation from Judge Lacombe's decision in the case at bar:

> It is not difficult to conceive of some sufficient reason why the United States having assumed certain treaty obligations should provide a scheme for carrying them out which should not provide for enlargement on bail;

> and we find that whereas the statutes regulating the arrest of persons in one Federal district who may be charged with crime in another district provide for taking bail, the statute regulating international extradition makes no such provision. (Record, p. 11.)

It is, therefore, respectfully submitted that the decision of the United States circuit court for the southern district of New York on the questions of law herein discussed should be sustained.

HENRY M. HOYT,
Solicitor-General.

MILTON D. PURDY,
Assistant Attorney-General.

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